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January 20, 2004

VIA HAND DELIVERY

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Notice of Written *Ex Parte* Presentation by
<u>US Datanet in WC Docket Nos. 02-361, 03-211 and 03-266</u>

Dear Ms. Dortch:

Today, on behalf of US Datanet, I distributed the attached written *ex parte* presentation to Chairman Michael Powell, Commissioner Kathleen Abernathy, Commissioner Michael Copps, Commissioner Kevin Martin, Commissioner Jonathan Adelstein, Bryan Tramont, Christopher Libertelli, Matthew Brill, Jessica Rosenworcel, Lisa Zaina, Daniel Gonzalez, William Maher, John Rogovin, Jeffrey Dygert, John Stanley, Debra Weiner, Paula Silberthau, Jeffrey Carlisle, Michelle Carey, Tamara Preiss, and Jennifer McKee.

As required by Section 1.1206(b), this *ex parte* notification is being filed electronically for inclusion in the public record of the above-referenced proceeding.

Please direct any questions regarding this matter to the undersigned.

Sincerely,

By:
Brad E. Mutschelknaus
Joan M. Griffin
Todd D. Daubert

Attorneys for US Datanet

Attachment

cc: Chairman Michael Powell
Commissioner Kathleen Abernathy
Commissioner Michael Copps
Commissioner Kevin Martin
Commissioner Jonathan Adelstein
Bryan Tramont
Christopher Libertelli
Matthew Brill
Jessica Rosenworcel
Lisa Zaina
Daniel Gonzalez
William Maher
John Rogovin
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January 20, 2004

VIA ELECTRONIC FILING

Michael K. Powell, Chairman
Federal Communications Commission
445-12th Street, S.W.
Washington, D.C. 20554

Re: Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges, WC Docket No. 02-361;

Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, WC Docket No. 03-211;

Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. ¶ 16(c) for Enforcement of 47 U.S.C. ¶ 251 (g), Rule 51.701(b)(1), and Rule 69.5(b), WC Docket No. 03-266.

Dear Chairman Powell:

US Datanet Corporation ("USA Datanet" or "the Company"), by its attorneys, is writing to urge the Commission to grant AT&T's Petition for Declaratory Ruling in the above-referenced proceeding. USA Datanet provides high-quality, value-based communications services (including long distance, Internet access, international calling, calling cards, and personal toll-free services) to residential and small business customers using advanced VOIP technology. USA Datanet was an early "first adopter" of VOIP technology and a pioneer in the deployment of VOIP services. The Company installed the nation's first SONUS network to enable it to provide VOIP services to end users, and now utilizes that network to provide VOIP services to several hundred thousand residential and small business customers.

USA Datanet strongly supports AT&T's request for ruling. USA Datanet agrees that the full range of VOIP services -- including "phone-to-phone" applications -- qualify as "information services" within the meaning of the Telecommunications Act and existing FCC rules and policies, and therefore are entitled to connect to the PSTN without paying the crushing burden of existing subsidy laden ILEC switched access charges. As AT&T, USA Datanet and numerous others have explained in the record herein, the FCC has never acted to require phone-to-phone VOIP providers to pay switched access charges, and to do so now would represent a destructive reversal of long-standing Commission precedents and policies relating to IP-based services.

Having said that, the Company is aware that some ILECs now argue that AT&T's petition should be denied, *and* that the Commission should clarify that such a denial would have *retroactive* application. These ILECs have not been shy in revealing their intention to launch a torrent of access charge-related litigation targeted at VOIP providers if only the Commission gives them an opening to do so. Put plainly, denial of the AT&T petition could have a *crippling* effect on the emerging VOIP industry, but retroactive application of such a denial *would* have a *lethal* impact on it. Thus, USA Datanet submits this filing to address one issue: whether any determination made by the Commission that VOIP service providers are liable for access charges and USF contributions should apply retroactively. As shown below, there is no basis in law or policy for assessing such charges and contributions on any services provided or revenues earned or received prior to the effective date of the Commission's determination.[1]

While most of the debate in this proceeding has been framed in terms of whether IP telephony services are telecommunications services or information services, it is not clear that the Commission will use this framework to determine what, if any, regulatory requirements should apply to these services. Chairman Powell has indicated in published remarks, as well as in impromptu comments made during the December 1 VOIP Forum, that the answer to the question of the appropriate regulatory treatment for IP telephony services may lie outside of the established "telecommunications"/"information services" dichotomy -- that the Commission may decide instead to "build from a blank slate up" to determine appropriate treatment.[2] It is also not clear that the Commission will resolve the question of whether IP telephony service providers are liable for access charges and USF contributions in the context of this declaratory ruling

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1 In the comments and reply comments USA Datanet previously filed in this proceeding, USA Datanet argued persuasively why IP telephony services should be exempt from access charges and USF contributions. *See Joint Comments of The American Internet Service Providers Association, The California Internet Service Providers Association, The Connecticut ISP Association, Core Communications, Inc., Grande Communications, Inc., The New Mexico Internet Professionals Associations, Pulver.Com, and US Datanet Corporation ("Joint Commentors")*, filed Dec. 18, 2002; *Joint Reply Comments of the Joint Commentors*, filed Jan. 24, 2003. Those arguments are still valid and have been echoed by many other parties in this proceeding. As such, USA Datanet will not reiterate those arguments in this filing.

2 Remarks of Michael K. Powell, Chairman, Federal Communications Commission, On Voice Over IP At the Meeting of the Technology Advisory Council, FCC, Washington, D.C., Oct. 20, 2003, at 2.

proceeding. Chairman Powell announced last November that the Commission will soon initiate a rulemaking proceeding to consider the appropriate regulatory treatment of IP telephony services.[3]

Action in Rulemaking Proceeding: No Retroactivity Since No Statutory Authority

Regardless of the path chosen by the Commission, the Commission cannot lawfully apply any determination that IP telephony service providers are liable for access charges or USF contributions on a retroactive basis. If the Commission in the context of its rulemaking proceeding decides that IP telephony services are so unique that a new regulatory scheme is appropriate, and that providers of IP telephony services should be liable for access charges and USF contributions as a result, the law is clear: the Commission cannot change a service provider's past liability for access charges and USF contributions for services that have already been rendered. The Supreme Court stated plainly in *Bowen* that "retroactivity is not favored in the law," and thus that "a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms."[4] The Communications Act of 1934, as amended (the "Act"), does not grant the Commission such authority, and nothing in the Commission's decisions dealing with the retroactive application of newly adopted rules suggests that the Commission believes it has such power.[5] Since "Congress certainly knows how to draft a statute with unambiguous retroactive application," courts have been hesitant to construe statutes as containing such authority in the absence of an express provision.[6]

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3 FCC News Release, "FCC to Begin Internet Telephony Proceedings," Nov. 6, 2003. USA Datanet urges the Commission to grant the AT&T petition. However, in the event that the FCC has lingering doubts, USA Datanet suggests that the issues raised by the AT&T petition simply be included in the NPRM. There is no basis to prematurely deny AT&T's petition outright.

4 *Bowen v. Georgetown University Hospital,* 488 U.S. 204, 208 (1988). As Justice Scalia stated in his concurring opinion, agencies cannot alter "the *past* legal consequences of past actions" without an express grant of statutory authority to do so. *Bowen,* 488 U.S. at 219 (Scalia, J, concurring) (emphasis in original).

5 *See In re 1998 Biennial Regulatory Review – Streamlining Of Mass Media Applications, Rules, And Processes,* 14 FCC Rcd 17,525, 17, 535 (1999); *McElroy Electronics Corp. For Authorization To Serve Unserved Areas In Metropolitan Statistical Market Area No. 2B, Los Angeles, California,* 10 FCC Rcd 6762, ¶ 16 (1995) (*"McElroy"*).

6 *See Orrego v. 833 West Buena Joint Venture,* 943 F.2d 730, 735 (7th Cir. 1991).

Furthermore, the Commission cannot lawfully apply any rules adopted in the context of its rulemaking proceeding to alter the *future* legal consequences of IP telephony services provided by service providers in the past. Most notably, the Commission cannot require an IP telephony service provider to include revenues from IP telephony services furnished prior to the effective date of the new rules in its contribution base and make USF contributions on those revenues in the future. While the application of legislative rules to affect the future legal consequences of past events is not *per se* illegal in the absence of express statutory authority, it is illegal if the application is unreasonable.[7] Such retroactive application of the Commission's rules would clearly be unreasonable in this case. The Commission previously rejected arguments that IP telephony service providers are required to make USF contributions on their IP telephony service revenues.[8] In reliance on that finding, many IP telephony service providers have not attempted to recover these amounts through their charges to their customers.

<u>Action in Declaratory Ruling Proceeding: No Retroactivity
Since "Manifest Injustice" Would Result</u>

If the Commission decides to hold IP telephony service providers liable for access charges and USF contributions in the context of ruling on AT&T's petition for declaratory ruling, perhaps by finding that IP telephony services are "telecommunications" services and thus subject to Title II regulatory obligations, the result vis-à-vis the retroactive application of the Commission's finding is no different. Bottom line, it is not permissible. When an agency's finding in an adjudicative proceeding[9] results in "new applications of existing law, clarifications, and additions," retroactivity will be denied "when to apply the new rule to past conduct or to prior events would work a 'manifest injustice.'"[10] While the courts have enunciated various tests

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7 *Bowen,* 488 U.S. at 477-478 (Scalia, J, concurring); *McElroy*, 14 FCC Rcd at 17,535-17,536.

8 *See 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Services, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms,* Report and Order, 16 Comm.Reg. (P&F) 688, ¶ 22, 1999 WL 492955 (1999) ("*1998 Biennial Regulatory Review Order Re USF*").

9 A declaratory ruling proceeding is an adjudication. *Petitions of Sprint PCS and AT&T Corp. For Declaratory Ruling Regarding CMRS Access Charges,* 17 FCC Rcd 13192, ¶ 20, n.51 (2002), *citing* 47 CFR § 1.2 and 5 U.S.C. § 554.

10 *Verizon Telephone Companies v. FCC,* 269 F.3d 1098, 1109 (D.C. Cir.) (citations omitted). In contrast, when there is a "'substitution of new law for old law that was reasonably clear,' the new rule may justifiably be given prospectively-only effect in order to 'protect the settled expectations of those who had relied on the preexisting rule.'" *Id.* (citations omitted). As discussed herein, the FCC decided in the *Report to Congress* that until further notice, *no* form of IP telephony services would be subject to *any* access charges, USF contributions, or other forms of traditional

for determining when to deny retroactive effect, the D.C. Circuit Court has observed that all of these tests reduce to considerations of equity and fairness and has suggested that detrimental reliance (or lack thereof) is a crucial point.[11]

IP Telephony Service Providers Have Relied On FCC's Position. A balancing of equities here compels the conclusion that the Commission cannot apply access charges or USF contribution requirements to IP telephony services retroactively. USA Datanet and other IP telephony service providers have relied heavily on the Commission's firmly held and consistent position that IP telephony service providers are not liable for access charges or USF contributions for their IP telephony services. The IP telephony service industry has operated for years on the basis that no access charges or USF contributions would be assessed on IP telephony services, at least until such time as the Commission issued a definitive ruling to the contrary. Decisions on whether to invest in new equipment or technology and on how to price services have been made with this understanding in mind. Capital has been available to service

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telecommunications regulation. *See Federal-State Joint Board On Universal Service,* Report to Congress, 13 FCC Rcd 11501, ¶ 91 (1998) ("*Report to Congress*"). As such, it can be argued that the Commission created new law regarding the applicability of access charges and USF contributions to IP telephony services in the *Report to Congress* and that any decision of the Commission in this proceeding to apply access charges and USF contributions to IP telephony services constitutes new law that cannot apply retroactively. The FCC is authorized to create rules using a variety of methods, including legislative rulemaking, adjudication, interpretive rulemaking and less formal means. *See* 47 U.S.C. § 154(i); *U.S. v. Storer Broadcasting Co.,* 351 U.S. 192 (1956). Provided the agency's actions fall within the scope of its Congressional mandate, incorporate an appropriate level of procedural fairness and are a "reasonable" method by which to reach the desired goal, they are a legitimate exercise of the agency's powers. KENNETH CULP DAVIS & RICHARD PIERCE, JR., ADMINISTRATIVE LAW TREATISE, CHS. 3, 6 (3d ed. 1994). The FCC's determination in the *Report to Congress* that access charges and USF contributions would not apply to IP telephony services at the time satisfies this criteria. The *Report to Congress* was compiled in the midst of a major ongoing, active docket addressing the full complement of universal service issues and policies. Specific public notice was issued regarding the plan to draft the report and expressly requesting participation from the community towards that end.

11 *See Verizon Telephone Companies,* 269 F.3d at 1109-1110; *Communications Vending Corp. of Arizona, Inc. v. Citizens Communications Co.,* Memorandum Opinion and Order, FCC 02-314, rel. Nov. 19, 2002, at ¶ 33 (*"CVCA"*). In *Verizon Telephone Companies* and *CVCA*, the ILECs were forced to disgorge end user common line fees that they had previously charged to independent payphone providers, despite the fact that the FCC had previously and incorrectly found these fees to be reasonable and therefore lawful, and the ILECs had relied on the Commission's conclusion.

providers for investment in new technology in large measure because of the deregulatory policies of the Commission.

FCC Position Is Clear And Absolute In Multiple Orders, Proceedings, and Public Statements. The determination of the Commission in the *Report to Congress* with respect to the obligations of IP telephony service providers to pay access charges or comply with other telecommunications regulatory obligations is clear and absolute. To paraphrase the language of the *Report to Congress*, the FCC stated that *if* the only form of IP telephony that could be construed to be a telecommunications service, phone-to-phone IP telephony, was indeed found to be a telecommunications service, *and* phone-to-phone IP telephony was found to use the *same* access as other interexchange services *and* impose the *same* burdens on local exchange networks, then *at that point*, phone-to-phone IP telephony services *might* be subject to access charges which *might* resemble those imposed upon basis telecommunications services at the time.[12]

This message of "no, not now" with respect to the application of access charges to IP telephony services was loud and clear in other actions of the Commission as well. For example, in its notice of proposed rulemaking on reciprocal compensation, the FCC stated that "long distance calls handled by ISPs using IP telephony are generally exempt from access charges..."[13] The message of "no, not now" with respect to the applicability of access charges to IP telephony services was also conveyed in what the FCC *refrained* from doing after adopting the *Report to Congress*. Most notably, the Commission has undertaken a detailed review of its access charge scheme, mandating extensive rule modifications.[14] Nowhere in these orders did the FCC suggest that the providers of IP telephony services must pay access charges. Similarly, following release of the *Report to Congress*, the Commission refused to entertain petitions for declaratory ruling that access charges apply to IP telephony services. With respect to the U S West petition,[15] the Commission never issued a public notice or otherwise request comment on the petition, which was later withdrawn. In addition, as noted previously, the Commission also declined to require carriers to include revenues from their IP telephony services in their contribution base for the USF.[16]

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12 *See Report to Congress, supra* note 10, at ¶ 91.

13 *Developing a Unified Intercarrier Compensation Regime,* Notice of Proposed Rulemaking, 16 FCC Rcd 9610, 9613 (2001), citing the *Report to Congress*.

14 *See MAG Order*, 16 FCC Rcd 19613 (2001); *CALLS Order*, 15 FCC Rcd 12962 (2000); *Access Charge Reform*, 12 FCC Rcd 15982 (1997).

15 *Petition of U S West, Inc. for Declaratory Ruling Affirming Carrier's Carrier Charges on IP Telephony,* Petition for Expedited Declaratory Ruling, filed Apr. 5, 1999.

16 *See 1998 Biennial Regulatory Review Order Re USF*, *supra* n. 10.

Finally, the public record is replete with statements from individual Commissioners that confirm that providers of IP telephony services are not liable for access charges or USF contributions. For example, in remarks to the International Telecommunications Union's Second Global Symposium for Regulators, Chairman Power said that "in the United States we have yet to choose to regulate IP telephony and are confident of that decision. We do not assume it is simply a new form of an old friend."[17] Other regulators have also understood this to be the Commission's policy. For example, Chairman Patrick Wood of the Texas Public Utilities Commission, in testifying before the Texas House of Representatives Committee on State Affairs, Subcommittee on Cable and Broadband, stated that "the FCC has said [voice over Internet] does not pay access charges" at least until such time as a large percentage of "all the voice traffic in America [travels] over the Internet."[18]

Reliance On FCC Position Was Reasonable. In light of these facts, the reliance of USA Datanet and other IP telephony service providers on the inapplicability of access charges and USF contributions is entirely reasonable. In every possible forum, and despite the repeated attempts of the ILECs and other parties to convince the Commission to do otherwise, the FCC and individual commissioners stuck with their position that IP telephony service providers are not obligated to pay access charges, or comply with other telecommunications regulatory requirements, such as USF contributions. As such, this case is distinguishable from *Verizon Telephone Companies* and other cases in which the court has held that a party's reliance was not reasonable and thus that the new rule would apply retroactively – *e.g.*, where the relying party acted wholly on its own initiative and not per the direction of the FCC, or where the FCC's policy was never articulated outside of a single chain of proceedings that was subject to challenge to progressively higher legal authorities.[19] USA Datanet notes that the ILECs have in many respects acquiesced to the FCC's position on access charges. Unlike the payphone providers in *Verizon Telephone Companies,* the ILECs have exercised few of their legal options for challenging the Commission's position; *inter alia*, they have filed few if any complaints

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17 Remarks of FCC Chairman Michael K. Powell, ITU 2nd Global Symposium for Regulators, Geneva, Switzerland, Dec. 4, 2001; *see also* Welcoming Remarks by Com'r Kevin J. Martin, FCC, to the African VOIP Conference, Supercomm 2002, Atlanta, GA, June 5, 2002, at 2 ("in the United States, we have not chosen to regulate IP telephony, but are continuing to monitor marketplace developments").

18 Testimony of Chairman Patrick Wood, Texas Public Utilities Commission, before Texas House of Representatives Committee on State Affairs, Subcommittee on Cable and Broadband, Transcript of Proceedings, pp. 32-34 (May 2, 2000).

19 *See Verizon Telephony Companies,* 269 F.3d at 1110.

against IP telephony service providers at the FCC to establish their right to access charges and toll the applicable statute of limitations.[20]

Furthermore, the reliance of USA Datanet and other IP telephony service providers on the Commission's position re the inapplicability of access charges and USF contribution requirements is reasonable because USA Datanet and the other IP telephony service providers have had no other option from a practical perspective.[21] As noted previously, the Commission indicated in the *Report to Congress* that even if it determines that access charges should apply to IP telephony services, it is not necessarily the case that providers of these services will be liable for the same access charges as providers of ordinary telephony services – a logical conclusion, since it is not clear that ISPs use the public switched network in a manner analogous to IXCs.[22] That said, if an IP telephony service provider does not want to rely on the Commission's position re the inapplicability of access charges, what amount of access charges does the service provider pay to the ILECs? Existing access tariffs assume traditional network configurations, and therefore contain rate elements frequently not used by providers of IP telephony. If an IP telephony service provider pays access charges at the rates applied to standard telecommunications services, the service provider would be reimbursing the ILECs for costs not legitimately associated with the actual services provided.

Similarly, if an IP telephony service provider does not want to rely on the Commission's position re the inapplicability of USF contributions, what does the service provider do – include the revenues in its contribution base? Such action would be contrary to the Commission's express direction that these revenues are not to be included. If the IP telephony service provider includes these revenues in its contribution base, USA Datanet seriously questions whether the IP telephony service provider can legitimately recover these costs from its customers.

Reliance On FCC Position Is Detrimental. If the Commission now determines that IP telephony service providers should be liable retroactively for access charges and USF contributions, there is no question but that USA Datanet and other IP telephony service providers will have relied on the Commission's statements in the *Report to Congress* and actions in other proceedings to their detriment. If IP telephony service providers must pay access charges and contribute to the USF for all services rendered in years prior, the harm to the IP telephony service industry will be significant. The amounts owed for access charges and USF

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20 *See Verizon Telephone Companies,* 269 F.3d at 1110; *CVCA* at ¶ 37.

21 This contrasts to the situation of the ILECs in *Verizon Telephone Companies,* where nothing forced the ILECs to impose end user common line fees on the payphone providers and thus to rely on the Commission's determination that such fees were lawful.

22 *See Access Charge Reform*, 12 FCC Rcd 15982, 16134 ¶ 345 (1997).

contributions will be substantial. Significant resources will have to be devoted to determining precisely what access charges are owed to what carriers, and undoubtedly those amounts will be the subject of considerable dispute. Needless to say, USA Datanet and the other IP telephony service providers will not be able to return to the customers to whom they have provided services in years past and recover these costs. The exorbitant new costs imposed on the IP telephony service industry will discourage capital investment and make it difficult if not impossible for service providers such as USA Datanet to provide innovative new services to their customers. Bottom line, American consumers will suffer if the Commission decides that IP telephony service providers must pay access charges and contribute to the USF for services rendered in years past.

LECs Have Not Been Harmed By FCC's Position. In sharp contrast, the ILECs have not suffered as a result of the FCC's decision not to hold IP telephony service providers liable for access charges or USF contributions. The ILECs have been paid for any access services they have provided, just not at above-cost access charge rates. Nothing suggests that universal service has been adversely impacted because the IP telephony service providers have not paid into the USF.

No Statutory Purpose Advanced By Retroactive Application. Finally, USA Datanet notes that no statutory purpose is advanced by the retroactive application of access charges and assessment of USF contributions. Nothing in the Act suggests that Congress wants the ILECs to be paid for their services at the highest possible rates or the USF to be over-funded. However, Section 230(b) of the Act evinces Congress' intent to promote the continued development of the Internet and "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services unfettered by Federal or State regulation."[23] Holding IP telephony service providers liable for access charges and USF contributions for services rendered in the past would discourage, not promote, achievement of this statutory goal.

Conclusion

The Commission should not be lulled into complacency by ILEC intimations that retroactive application of a denial of the AT&T petition is a modest reshuffling of the deck chairs in the industry. VOIP providers understandably and in good faith built their businesses in reliance upon FCC policies that exempted IP-based applications from the imposition of switched access charges. VOIP providers developed and charged low end user rates that did not include the recovery of switched access charges. There is simply no way for VOIP providers to go back and retroactively recoup switched access revenue from their customers for past services. Thus, any exposure to retroactive collections actions would have a devastating impact upon USA

[23] 47 U.S.C. § 230(b)(1),(2).

Datanet and others in the VOIP industry. The FCC should grant AT&T's petition, but in the event that it does not, the Commission must make clear that it is announcing a new policy and that its decision has only prospective application.

Sincerely,

US DATANET CORPORATION

By: ____________________

Brad E. Mutschelknaus
Joan M. Griffin
Todd D. Daubert

Its Attorneys

cc: Commissioner Kathleen Abernathy
Commissioner Michael Copps
Commissioner Kevin Martin
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